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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-911 and 78-1036

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner.

v.

AMERICAN PETROLEUM INSTITUTE, *et al.*

BRIEF AMICUS CURIAE OF THE CHOCOLATE MANUFACTURERS ASSOCIATION

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TABLE OF CONTENTS

	Page
I. Interest of the Amicus Curiae	1
II. Argument	2
III. Conclusion	6

TABLE OF AUTHORITIES

Cases:

RMI Co. v. *Secretary of Labor, et al.*, 544 F.2d 566 (1979) 4

Turner Company v. *Secretary of Labor, et al.*, 561 F.2d 821 (1977) 3, 4

Executive Order:

Executive Order No. 12044, 43 Fed. Reg. 12661 (March 24, 1978) 5

Other:

Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972) 5

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I. INTEREST OF THE AMICUS CURIAE

In the opinion below the Fifth Circuit held that the Occupational Safety and Health Administration, when it promulgates an occupational safety and health standard under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, *et seq.*, has a statutory obligation to identify the expected costs and benefits of the standard and to "determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard." 581 F.2d

493 at 503. The Fifth Circuit went on to find that, in this case, OSHA had failed to make the necessary determinations.

The Chocolate Manufacturers Association (CMA) is filing this *amicus* brief solely to underscore the importance of the basic principle applied by the Fifth Circuit: that OSHA standards must be "reasonable" in the sense that both the benefits to be derived and the costs of compliance must be considered.

CMA is a trade association whose member companies are engaged in the business of manufacturing chocolate products. CMA members are not familiar with the benzene standard which is under review in this case, and they have had no experience under it. Their concern that OSHA rules be "reasonable" stems directly from their attempts to comply with other OSHA regulations: those which limit exposure of workers to noise.[1] CMA believes that the experience of industry under OSHA's noise regulations may be relevant to any general interpretation of the Occupational Safety and Health Act.

II. ARGUMENT

OSHA's noise regulations require manufacturers to use all "feasible" methods to reduce physical noise levels in their plants to allowable limits. Only if there

[1] OSHA's noise standard provides in relevant part that:

> When employees are subjected to sound exceeding those listed in Table G-16, *feasible administrative or engineering controls shall be utilized.* If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table. 29 C.F.R. § 1910.95(b)(1). (emphasis supplied)

is no "feasible" way to reduce worker exposure to noise to those limits is an employer permitted to rely upon the use of earplugs and personal protective equipment to protect workers' hearing. The cost of redesigning and rebuilding factories and equipment is obviously enormous when compared to the alternative cost of issuing individual hearing protectors. Food processors face particularly difficult problems in complying with noise requirements because good sanitation practices (and the requirements of the Food and Drug Administration) require the use of hard, easily cleanable surfaces rather than soft, sound absorbing material in their plants.

In enforcement actions arising under the noise standard, OSHA has consistently taken the position that it has no obligation to weigh economic costs. OSHA's position on noise control, like the position it advances in this case, is that it is required only to show that an engineering solution is technically possible and that it will not jeopardize the solvency of the employer.[2]

In the context of noise control, the courts have emphatically rejected OSHA's cost-blind approach to regulation. In *Turner Company* v. *Secretary of Labor, et al.*, 561 F.2d 82, 83 (1977), the Seventh Circuit looked to the "clear intent of Congress and the pur-

[2] *See*, for example, Turner Company v. Secretary of Labor, et al., 561 F.2d 82, 83 (7th Cir. 1977), in which OSHA argued that it was proper for it to limit its "consideration [of costs] to the financial ability of an employer to pay for technological controls irrespective of compelling alternatives."

In a pending action before the Ninth Circuit, OSHA is arguing that "engineering [noise] controls are economically feasible [whenever] they do not threaten financial viability of an employer." Brief for the Secretary of Labor in Marshall, *et al.* v. Castle & Cooke Foods, *et al.* (No. 77-2665) at 24 (filed February 3, 1978).

pose of the Occupational Safety and Health Act" and concluded that the term "feasible" as used in the noise regulation "must be given its ordinary and common sense meaning of 'practicable.'" The *Turner* Court applied a standard originally established by the Occupational Safety and Health Review Commission and admonished OSHA that it must "realistically consider the hazards presented by the excessive noise . . . and determine whether the health benefits to employees who are already equipped with personal protection equipment justified the . . . costs . . . for engineering controls." 561 F.2d at 86. The Sixth Circuit approved and applied the *Turner* test and noted that: "a consensus is developing among the circuits that the term 'feasibility' [as used in the noise regulation] should encompass both technological and economic feasibility." *RMI Co.* v. *Secretary of Labor, et al.*, 594 F.2d 566, 571-72 (1979).

Of central importance to both circuits was the failure of OSHA to weigh the availability of less costly methods to achieve the health goals of the standard.

The requirement that OSHA must determine whether the benefits "expected from a standard bear a reasonable relationship to the costs imposed by the standard" is nothing more than a recognition that capital resources are finite and that finite resources must be allocated in a rational way. If workers' hearing can be protected by means of inexpensive hearing protectors and regular audiometric testing, it is neither rational nor "reasonable" to require massive capital investments in plant and equipment. Further, OSHA regulation does not exist in a vacuum. Manufacturers are simultaneously subject to regulation by many agencies with many different goals. It is obviously not possible

to allocate finite resources in a rational fashion if the test applied by each regulatory agency is whether the capital expenditures required by the regulations of that agency alone will endanger the financial health of the industry. Rational allocation of resources is possible only if each agency is required to identify and evaluate the benefits of its proposed regulations together with their costs. It was partially in recognition of the fact that resources are finite that Congress expressly required OSHA to measure its standards by the test of "reasonableness."[3]

For the same reason, the President of the United States has adopted as the policy of the executive branch of the government that regulations "shall not impose unnecessary burdens on the economy" and that all executive agencies shall consider "alternative approaches" to ensure that "the least burdensome of the acceptable alternatives has been chosen." Executive Order No. 12044 (Improving Government Regulations), 43 Fed. Reg. 12661, 62 (1978).

The Chocolate Manufacturers Association is not familiar with the record before the agency in this case and therefore takes no position on whether OSHA properly considered costs and benefits in this particular case. CMA's concern is that the Court's opinion not diminish the obligation of OSHA in regulating other hazards, including noise, to be sensitive to the economic costs of its regulations and to determine whether the

[3] The statute, 29 U.S.C. § 652(a), requires that OSHA regulations be "reasonably necessary or appropriate." In the context of tort law, one commentator has said:

> "Reasonableness is determined by a straight-forward balancing of cost and benefit." Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 542 (1972).

costs of a proposed regulation are reasonable in light of the benefits to be derived from it.

III. CONCLUSION

The CMA respectfully urges this Court, whether it affirms or reverses the decision below, to affirm the basic principle that OSHA must identify and consider both the costs of compliance and the benefits of the regulations which it proposes.

Respectfully submitted,

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July 30, 1979